Supreme Court, U.S.
FILED

No. 031024 NOV 24 2003

In The

Supreme Court of the United States

WILLIAM ADDERSON JARRETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERR WHEN IT CONCLUDED THAT AN UNIDENTIFIED HACKER, UNKNOWNUSER, WAS NOT AN AGENT OF THE GOVERNMENT WHEN HE UNLAWFULLY SEARCHED WILLIAM A. JARRETT'S COMPUTER?

PARTIES TO THE PROCEEDINGS

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The published decision of July 29, 2003 by the Court of Appeals appears on Pages 2a through 17a of the Appendix. The Court of Appeals' denial of the Petition for Rehearing and Rehearing En Banc, entered on August 26, 2003, appears on Page 1a of the Appendix. The decision of the United States District Court for the Eastern District of Virginia granting the motion to suppress appears on Pages 18a through 48a of the Appendix.

JURISDICTION

The decision and order of the Court of Appeals for the Fourth Circuit was entered on July 29, 2003. A Petition for Rehearing and Rehearing En Banc was timely filed on August 12, 2003 and was denied on August 26, 2003. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts of this case did not begin with the arrest of William A. Jarrett, but approximately eighteen months before that. On or about July 16, 2000 an unknown computer user in Turkey (hereinafter known as "Unknownuser") sent an anonymous e-mail to the Montgomery, Alabama police department stating that he had found a child molester on the internet. That child molester was Bradley Steiger, an Alabama doctor. The Turkish informer's e-mail address was "unknownuser1069@hotmail.com" and the authorities referred to him as "Unknownuser" in their responses.

After the first e-mail there were a series of e-mail communications between Unknownuser and Captain Kevin Murphy of the Montgomery Police Department. During these communications, additional information was provided by Unknownuser regarding Dr. Steiger. During this time, Captain Murphy contacted FBI Special Agent Margaret Faulkner for assistance and worked with her in formulating responses and requests to Unknownuser.

On August 7, 2000 Captain Murphy sent an e-mail to Unknownuser requesting assistance "right away." It was his intent to ask Unknownuser for help in gaining access to relevant portions of the computer seized from Dr. Steiger. Unknownuser responded after several days but, at that point, law enforcement had already gained access to the computer hard drive in question. Contact between law enforcement and the Unknownuser, however, did not end there.

In November and December 2000, a series of e-mails were exchanged between Unknownuser and FBI Special Agent Jim Duffy who was based in Istanbul, Turkey. Agent Duffy stated in his second e-mail to Unknownuser that

Unknownuser would not be prosecuted for his illegal activities and that "authorities in the U.S." . . . "would like me to interview you and I have a list of questions." Agent Duffy went on to state that "[y]ou have helped save at least two lives in the U.S. and you should be proud of that fact." On December 4, 2000 Agent Duffy thanked Unknownuser for his help again and stated, "[i]f you want to bring other information forward, I am available." In May 2001 Agent Duffy contacted Unknownuser again and assured him that Unknownuser would not be prosecuted.

On or about December 3, 2001, Unknownuser contacted (now) Major Murphy and advised that he had found another child molester, naming William A. Jarrett. In the series of e-mails that followed, Murphy obtained additional information from Unknownuser and informed Unknownuser that the FBI had been contacted. Murphy stated that "[t]he FBI has asked that you send whatever information you have regarding this criminal complaint to my e-mail address. Less than two weeks later, on December 13, 2001, FBI Special Agent Zachery T. Lowe obtained a search warrant for William A. Jarrett's residence and evidence was seized leading to an eight-count indictment against William A. Jarrett. The only evidence presented in the Affidavit for Search Warrant was information the FBI received from Unknownuser.

Beginning on December 16, 2001 e-mail contact was reestablished between Agent Duffy and Unknownuser. On December 19, 2001 Agent Duffy thanked Unknownuser for his "valuable assistance" to U.S. law enforcement and advised him to "maintain contact with FBI Agent Margaret Faulkner . . . with any additional information about violations of our laws." Agent Duffy went on to provide Agent Faulkner's e-mail address and advised that "she should be your point of contact from now on."

Agent Faulkner began having direct contact with Unknownuser via e-mail on December 19, 2001. In her initial e-mail she thanked Unknownuser for his "concern and willingness to forward these type cases to us" and stated that she "will be glad to be the contact point for you if you have further questions or concerns about matters such as the ones you recently sent to us via the Montgomery Police Department."

Agent Faulkner went on to state, "I can not ask you to search out cases such as the ones you have sent to us. That would make you an agent of the Federal Government and make how you obtain your information illegal and we could not use it against the men in the pictures you send. But if you should happen across such pictures as the ones you have sent to use and wish us to look into the matter, please feel free to send them to us."

After this initial e-mail, there were a series of e-mails between Agent Faulkner and Unknownuser that are reproduced in the Opininion of the United States District Court. These e-mails were of increasing length and contained a great deal of personal information about both Agent Faulkner and Unknownuser. On one occasion in late January 2002, Agent Faulkner assured Unknownuser that "Federal attorneys have expressed NO desire to charge you with an CRIMINAL offense."

A hearing was held on October 3, 2002 on William A. Jarrett's Motion to Reconsider Motion to Suppress before the Honorable Richard Williams, and on November 1, 2002, Judge Williams entered an order vacating the Court's earlier order and granting William A. Jarrett's motion to suppress. The United States appealed the District Court's decision and the Court of Appeals reversed and remanded.

REASONS THE WRIT SHOULD BE ALLOWED

THE FOURTH CIRCUIT INCORRECTLY HELD THAT UNKNOWNUSER WAS NOT AN AGENT OF THE GOVERNMENT WHEN HE UNLAWFULLY HACKED INTO AND ILLEGALLY SEARCHED WILLIAM A. JARRETT'S COMPUTER.

This private search of William A. Jarrett's computer was constrained by the Fourth Amendment because law enforcement officials had been informed by Unknownuser of the means and methods he was using to conduct searches. "Though individuals have a fourth amendment right to be free from unreasonable searches and seizures by the government, purely private searches are not subject to constitutional restrictions." United States v. Feffer, 831 F.2d 734, 737 (9th Cir.1987), citing, Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395 (1980). "A difficult issue arises, however, once the government is contacted by a private searcher. The government may not do, through a private individual, that which it is otherwise forbidden to do. Accordingly, if in light of all the circumstances a private party conducting a search must be regarded as an instrument or agent of the government, the fourth amendment applies to that party's actions." Feffer, *supra*, at 737. The Ninth Circuit has stated that "two of the critical factors in the 'instrument or agent' analysis are: (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search." United States v. Walther, 652 F.2d 788, 792 (9th Cir.2002).

"The Fourth Amendment applies to a search conducted by a private citizen only if that individual is 'acting as an agent of the Government or with the participation or knowledge of any governmental official.'" United States v. Ellyson, 326 F.3d 522 (4th Cir.2003),

quoting, United States v. Jacobsen, 466 U.S. 109, 113, 104 S.Ct. 1652 (1984). "For purposes of the exclusionary rule, a private actor must 'be regarded as having acted as an "instrument" or agent of the state,' in order for a private search to be considered action by the government." United States v. Kinney, 953 F.2d 863, 865 (4th Cir.1992), quoting, Coolidge v. New Hampshire, 403 U.S. 443, 487, 91 S.Ct. 2022 (1971).

While the Fourth Circuit correctly summarizes the law, it fails to apply that law to the facts of the case at bar. Given that the United States concedes Unknownuser intended to help law enforcement, the only questions is "....did the Government know of and acquiesce in Unknownuser's search in a manner sufficient to transform Unknownuser into an agent of the Government, and so render the search unconstitutional." United States v. Jarrett (4th Cir.2003; Appendix, p.11a). The Fourth Circuit held that the factual findings of the district court were adequately supported by the record and certainly were not clearly erroneous. The decision of the Fourth Circuit, however, disregards several of these same factual findings. Unknownuser had, by his own admission, hacked into more than 2,000 computers when he initially provided information to the government regarding Dr. Bradley Steiger. This was revealed to the government in an e-mail of November 30, 2000 from Unknownuser to Special Agent James Duffy of the F.B.I. (Appendix, p.27a, Finding of Fact #32). This e-mail follows an exchange of communications between Special Agent Duffy and Unknownuser, during which Duffy thanked Unknownuser for what he had done and promised he would not be prosecuted. (Appendix, pp.26a-27a, Findings of Fact #28-31). Unknownuser was told that he saved two lives and that his information was valuable. He was asked to maintain contact with the F.B.I. and to forward any additional information that he discovered. (Appendix, pp.27a-28a, Finding of Fact #33).

The information in question was clearly not discoverable by any legal means and that fact was obviously known to the government. Despite this knowledge, the government never told Unknownuser to stop doing what was obviously illegal. Instead, he was thanked, given what amounted to immunity from prosecution, and asked to forward any additional information. Such statements made to an individual who had repeatedly expressed an interest in helping law enforcement by catching child pornographers cannot be seen as anything except encouragement to continue his illegal activity. Combining this encouragement with assurances of not prosecuting him for his hacking, thanking him for his assistance, and telling him how valuable his assistance was, clearly results in an affirmative signal that the Government is a ready and willing participant in an illegal search. This is clearly an attempt to accomplish through the actions of a private party that which the Government cannot itself do. The offer of availability to receive further information is not, as the Fourth Circuit opines, " . . . a vague offer of availability to receive more information in the future" (United States v. Jarrett, 4th Cir. Appendix, p.14a). It is, rather, a clear entreaty, when examined in light of the previous communications, for further assistance in identifying and prosecuting child pornographers. In addition, the Fourth Circuit apparently disregards the fact that the Government previously solicited the assistance of Unknownuser in attempting to gain access to Dr. Steiger's computer (Appendix, p.23a, Finding of Fact #17). This solicitation, at the request of Special Agent Margaret Faulkner of the F.B.I., took Unknownuser beyond the role of simply being an unsolicited provider of information and into, when combined with all the other factors, the role of being an agent of the Government.

It is clear the Fourth Circuit has mistakenly interpreted the significance of the decision in United States v. Walther, 652 F.2d 788 (9th Cir. 1981). The Court in

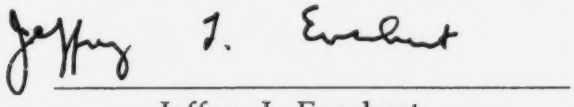
Walther said that "the Government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state", citing United States v. Gumerlock, 590 F.2d 794, 800 (9th Cir.) (en banc), Walther, at 791. That court went on to say, "We are also satisfied that Rivard's prior experience with the D.E.A. provides proof of the Government's acquiescence in the search. While the D.E.A. had no prior knowledge that this particular search would be conducted and had not directly encouraged Rivard to search this overnight case, it had certainly encouraged Rivard to engage in this type of search. Rivard had been rewarded for providing drug-related information in the past. He had opened Speed-Paks before and did so with no discouragement from the D.E.A. The D.E.A. thus had knowledge of a particular pattern of search activity dealing with a specific category of cargo, and had acquiesced in such activity." *id.*, at 793. In the case at bar, the Government was aware of Unknownuser's "particular pattern of search activity" and had not only acquiesced in it but had tacitly encouraged future searches. While it is true that Unknownuser expected no monetary reward for his actions, the reward he received for his unlawful efforts was the reality of no criminal prosecution, the apparent satisfaction of a job well done while assisting the Government, and the gratitude of law enforcement. A review of the e-mail exchanges between Unknownuser, Special Agent Duffy, and particularly, Special Agent Faulkner served to clarify the relationship. Given that all parties concede that Unknownuser was acting solely in the interest of law enforcement, there is not legitimate distinction between the instant case and the Walther case. The facts here clearly establish governmental knowledge of, and acquiescence to, Unknownuser's actions. In addition, while this Court correctly noted that there was a seven (7) -month hiatus of contact between Unknownuser and the Government, there

was an almost two (2)-year absence of contact between the informant and the Government in the Walther case.

CONCLUSION

For the reasons set forth herein, William A. Jarrett, respectfully requests that a petition for writ of certiorari be allowed.

Respectfully Submitted,



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